Current Public Sector Issues-Other Agencies and LAFCOs

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Overview

• Friend or Foe
• Indemnification
• Joint Defense Agreements
• Crafting Conditions
• Emerging Water Issues
LAFCO: Friend or Foe

• LAFCO Responsibility Over Agencies
  • Studies, MSRs, etc.
  • Review Applicant- and Agency-Initiated Proposals
  • Initiate Certain Proposals (Gov. Code, sec. 56375(a)(2).)
• Bottom-line: LAFCO can affect all local agencies (especially special districts)

LAFCO: Friend or Foe

• Best Practices
  • Educate first, especially smaller jurisdictions
  • Just because you can...
    • Absolutely a policy/political call but consider legal risks
  • Develop relationships
    • LAFCO as a resource

Indemnification

• Indemnification:
  • "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." (Civ. Code, sec 2772.)
  • The California Supreme Court has noted that indemnity "may be defined as the obligation resting on one party to make good a loss or damage another party has incurred." (Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal.3d 622, 628.)
  • Generally includes a duty to defend (Civ. Code, sec 2778; Crawford v. Weather Shield Mfg., Inc. (2008) 44 Cal.4th 541.)
Indemnification

• For LAFCOs, duty to defend is most important part
  • Damages generally not an issue; attorneys’ fees and costs are the major loss (even if LAFCO wins)
  • Retain ability to select counsel
  • Retain ability to settle / control defense

• But LAFCO cannot require indemnification...
  • No express provision in CKH. Implied ability under Sections 56383, 56384(b).
• Ok, but my lawyer just has a couple of edits...
  • Recommend standard policy and language. Don’t amend unless Legal Counsel reviews.
• I wasn’t authorized to sign that...
  • Talk to Legal Counsel on who can sign (depends on entity). Include as condition of approval.

Joint Defense Agreements

• If LAFCO is sued (especially in CEQA), can/should you share information with affected agency and applicant?
  • Commonly done through a joint defense agreement
  • Intent is to avoid waiver of attorney-client privilege
    • Generally, only protects communications between client and attorney
    • Exception for some third party disclosures (common interest)
Joint Defense Agreements


  * County shared communications from its CEQA counsel with developer’s counsel. Petitioner sought disclosure of those communications.
  * County claimed the communications were privileged.
  * Court evaluated Evidence Code section 954, and found that privilege was not waived due to application of the common interest doctrine.

Joint Defense Agreements


  * Prior to completion of CEQA process and project approval, City shared communications from its CEQA counsel with developer’s counsel. Petitioner sought disclosure of those communications.
  * City cited to Tehama decision and claimed that the communications were privileged.
  * Court found the common interest doctrine did not apply to communications, and any privilege under Evidence Code section 954 was waived.

Joint Defense Agreements

* **Best Practices**
  * Have Legal Counsel review your model agreement to see if it should be modified.
  * Consult with Legal Counsel before disclosing any attorney-client communications (good rule in all cases).
  * Be aware of ambiguity in the law. Possible to restrict or reduce shared information?
Crafting Conditions

• LAFCO can “review and approve with or without amendment, wholly, partially, or conditionally, or disapprove proposals for changes of organization or reorganization.” (Gov. Code, sec 56375(a)(1).)

• BUT, LAFCO cannot “impose any conditions that would directly regulate land use density or intensity, property development, or subdivision requirements.” (Gov. Code, sec 56375(a)(6).)

• How do you distinguish between permissible and impermissible conditions?
  * Habitat & Watershed Caretakers v. City of Santa Cruz (2013) 213 Cal.App.4th 1277
    * Court determined LAFCO could not regulate development on UC Santa Cruz campus.
    * BUT, it could condition water and sewer services on “low water condition” (i.e., supply ceiling)
    * LAFCO cannot specify form or manner of prezoning for annexations (Gov. Code, sec 56375(a)(7))

Crafting Conditions

• What happens if the local agency disagrees?
    * Agency must file a lawsuit. Court has exclusive ability to decide a condition is unconstitutional/impermissible.
Crafting Conditions

• Best Practices
  • No clear dividing line between impermissible “directly regulate” land use and permissible conditions that affect development
  • Stay away from zoning-type decisions
  • Ground conditions in service availability (even if it will indirectly affect development)

Emerging Water Issues for LAFCOs

• 2015 Update for Urban Water Management Plans
• Local Agency Drought Responses
  • Ability to provide services
• Groundwater Legislation
  • Rise of the JPAs?

Thank you for attending.

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